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February 12, 2021

VIA EMAIL

(b) (6)
Holland & Knight LLP
800 17th St., NW, Suite 1100
Washington, D.C. 20006

(b) (6)

Re: B-418891 – Certified Claim for Costs

Dear Mr. (b) (6)

The United States General Services Administration (“GSA” or “Agency”), through counsel, hereby responds to Spectrum Investors, LLC’s (“Spectrum” or “Protester”) certified claim for costs in connection with the above-referenced protest. The claim was submitted after the Government Accountability Office (“GAO”) dismissed the protest as academic on October 6, 2020 through public decision wherein it accepted the Agency’s October 1 Notice of Corrective Action. That notice explained that the Agency was “amenable to taking corrective action to resolve the protest ground(s) GAO stated it is likely to sustain” and that it had “no objection to reviewing a certified claim from Protester that, consistent with 4 C.F.R. § 21.8(f), documents its reasonable proposal preparation and protest costs so the parties, through negotiation, can determine reimbursement of those costs.”

You submitted a certified claim for costs (“Claim for Costs”) on Spectrum’s behalf on December 3, 2020 seeking (b) (4) in proposal preparation and protest costs. The purpose of this letter is to detail GSA’s views on the certified claim. Please be advised that the contracting officer makes the final decision for the agency on the total amount to be reimbursed. As an advisor in that determination, I have reviewed Protester’s claim and am notifying you of several issues we identified.

First, we question the scope of costs submitted by Protester for reimbursement, as the cost claim goes beyond the sole protest ground the GAO indicated it would likely sustain during the September 28, 2020 outcome prediction ADR and for which the Agency agreed to resolve in its Notice of Corrective Action. As you know, (b) (6)

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In order for a protester to recover costs, the protest ground must be clearly meritorious. National Opinion Research Ctr.- Costs, B-289044.3, Mar. 6, 2002, 2002 CPD ¶55 at 3. *See also* Sizewise Rentals, LLC-Costs, B-407566.2, July 3, 2013, 2013 CPD ¶166 at 5 (recommending reimbursement of protest costs, but limited to only those costs reasonably related to protester's pursuit of clearly meritorious issue). Further, the GAO has found there is no basis to award costs on protest grounds that a protester withdrew. Data Mgmt. Servs., Inc., B-233345.2, Mar. 1, 1989, 89-1 CPD ¶ 214 (finding no basis to award protest costs where a protester withdraws its request for GAO to consider it on the merits).

In appropriate cases, as we believe this case to be, the award of protest costs is limited to the successful protest grounds that are clearly severable from the unsuccessful issues. BluePath Labs, LLC-Costs, B-417960.4, May 19, 2020, 2020 CPD ¶175, *reconsideration denied* B-417960.6, July 10, 2020. *See also* Sodexho Mgmt., Inc.-Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶136 at 29. With respect to allegations of misevaluation, as in this protest, the GAO has "severed costs arising from allegations of misevaluation under separate evaluation factors on the basis that they are not clearly intertwined." *BluePath*, B-417960.4, May 19, 2020, 2020 CPD ¶175 at 4. *See also* Sodexho Mgmt., Inc.-Costs, B-289605.3, August 6, 2003, 2003 CPD ¶ 136 at 24 (the GAO "will limit a successful protester's recovery of protest costs where a part of its costs is allocable to a losing protest issue that is so clearly severable as to essentially constitute a separate protest").

Spectrum's protest grounds on (b) (4)

Thus, the Agency would not find it reasonable to pay Spectrum's costs for (b) (4)

Second, as it relates to protest costs, we request evidence of payment by Spectrum. There was no indication in the documentation submitted by Protester that it paid, or will pay, the costs claimed. The GAO has "denied requests for reimbursement of protest costs where the protester has not stated that the costs sought for reimbursement have or will be paid by the protester, regardless of [its] ruling on the request." Public Communications Servs., Inc.-Costs, B-4000058.4, June 25, 2009, 2009 CPD ¶ 131 at 6. Here, Protester's legal invoices reflect that payment was due upon receipt, yet no proof of payment was provided with Protester's certified claim.

Lastly, as it relates to the attorney's fees and Spectrum's proposal (aka "bid") preparation costs, including those of its (b) (4), we question the amounts claimed, as certain entries either do not reflect costs reasonably related to protester's pursuit of the

meritorious protest ground or they are not reasonable. For instance, in the aggregate, we view the (b) (4)

. Price Waterhouse-Claim for Costs, B-254492.3, July 20, 1995, 95-2 CPD ¶ 38 at 5 (The GAO “will examine the reasonableness of the attorney hours claimed to determine whether they exceed, in nature and amount, what a prudent person would incur in pursuit of his protest”). Each billing invoice submitted to the Agency is discussed in turn, below.

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Additionally, the billing method used precludes the agency from clearly identifying how much time was devoted to work performed in pursuit of the sustained protest ground. For instance, a (b) (4)

Consequently, the Agency would not find reimbursement of these costs, or ones similar to it on other invoices, reasonable.

The GAO has disallowed costs in their entirety when allowable and unallowable costs have been aggregated in such a way that the GAO cannot identify which costs are properly reimbursable. *See* Blue Rock Structures, Inc.-Costs, B-293134.2, Oct. 26, 2005, 2005 CPD ¶ 190 at 5 (disallowing the entire 2.2 hours of claimed cost for attorney's billed time when the billing statement was unclear as to how the attorney allocated the time he spent working on the protest among various other activities, one of which was unallowable). Here, the Agency is unable to identify which costs are properly reimbursable since the billable hours aggregate both allowable and unallowable costs for reimbursement.

Lastly, we view the (b) (4) hours expended by three attorneys to advance one protest ground that resulted in only two sentences in the initial and first supplemental protests as excessive and thus, not reasonable. We recognize the majority of these hours were spent working on Spectrum's unsuccessful protest grounds; thus, a revised invoice reflecting the reasonable time expended toward the parking protest ground would be welcome.

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Entries on this invoice date from 8/2 – 8/31 and reflect work primarily performed reviewing the Agency's five-day letter and on opposing redactions to exhibit 6, the GSA lease that Intervenor filed with the GAO. It also reflects work performed on preparing Spectrum's Comments to the Agency Report, responding to the Agency's Limited Supplemental Response and preparing the Second Supplemental Protest.

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While the GAO has recognized labor costs may be recoverable, it has also expressed its view that a recommendation by it for an agency to reimburse a protester its proposal preparation costs or protest costs “is not a blank check.” *Sodexo Mgmt., Inc.-Costs, supra*, at 7. Protesters must still submit evidence sufficient to support their claim that the costs incurred are properly attributable to proposal preparation. *Id.* Only if a claim is adequately documented and reasonable is it recoverable. *Id.* To this end, the GAO has found it reasonable for protesters’ to establish “that the claimed hourly rates reflect the employees’ actual rates of compensation plus reasonable overhead and fringe benefits.” *Id. citing W.S. Spotswood & Sons, Inc.-Claim for Costs*, B-236713.3, July 19, 1990, 90-2 CPD ¶50 at 3.

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Sincerely,

(b) (6)

Tammi Snyder Queen
Assistant Regional Counsel
Attorney for Agency

cc: Jessica Gunzel, Attorney for Agency (jessica.gunzel@gsa.gov)
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